

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7308

In The
United States Court of Appeals
For The Second Circuit

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

vs.

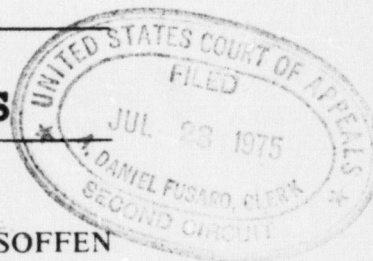
JEFFREY SNYDER, d/b/a J.S.N.Y. and ETNA PRODUCTS
CO., INC.,

Defendants-Appellants.

ORIGINAL

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P/S

**REPLY BRIEF FOR
DEFENDANTS-APPELLANTS**



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal No. 75-7308

-----X
L. BATLIN & SON, INC., :
Plaintiff-Appellee, :
v. :
JEFFREY SNYDER, d/b/a J.S.N.Y. and :
ETNA PRODUCTS CO., INC., :
Defendants-Appellants. :
-----X

REPLY BRIEF OF DEFENDANTS-APPELLANTS

The issue on appeal is whether Appellant Snyder's copyrighted Uncle Sam Bank is so lacking in either the originality required for a copyrightable reproduction of a work of art or the originality and creativity required for a copyrightable work of art as to deny Snyder, by way of preliminary injunction, the benefits of his statutory right to block importation of infringing goods. No other issues were considered or decided by the Court below and none was raised by the parties.

In this context, this Court must decide whether the Court below erred in granting the Preliminary Injunction. Furthermore, no F.R.C.P. Rule 52(a) findings were made by the Court below.

Reply to Appellee's Statement of Facts

At pp. 6-7 of the Appellee's Brief, Batlin asserts that its expert testified that there was very little difference between the 11 inch tall cast metal public domain Uncle Sam bank and Snyder's 9 inch tall, different appearing, plastic Uncle Sam bank. Batlin cites the testimony at A-53-58, which was the direct examination of its expert, Bloch, wherein Batlin's counsel sought to minimize Snyder's artistic authorship.

But, the cross-examination of the same Batlin witness shows he recognized that Snyder's bank had to be created by a skilled artist and sculptor, and that initial artistic sketches had to be made, subsequent artistic sculpting had to be done and artistic mold or die making had to be done by the artist sculptor*.

*Q I direct your attention to Plaintiff's Exhibit 1, the metal bank and ask you the steps that to your knowledge would have to go into going from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2 [the plastic bank]?

A [By Batlin's witness, Bloch] First of all, a drawing would have to be made.

Q A drawing would have to be made?

A Yes.

Q Who would make that drawing?

A A designer. (A-62, li. 12-20)

* * * * *

(Footnote continued to p. 7)

Batlin also cites its expert's testimony that Snyder's bank lacks "originality". At A-53, li. 20, when the witness was asked whether there is "originality" in Snyder's bank, Snyder's

(Footnote continued from p. 2)

Q I'd have to make a drawing?

A Yes.

Q What would the next step be?

A A model is made.

Q How would that model be made?

A Sometimes it is carved. Sometimes it is molded in plastilene. Sometimes it is carved in plaster. Sometimes it is carved in wood.

Q And following that, now, from your knowledge of plastic molding, following the making of which it is either sculptured or carved, what is the next step?

A I'd say you have to make a model.

Q You have to make a model?

A Yes.

Q The sculpting [sic] that you talked about was not the model?

A The sculpting?

Q You talked about a sculpture or plastic work that has to be made. Was that a model that you were referring to?

A Yes.

Q Following that sculptured model, what is the next step?

A Dies have to be made, molds.

Q Who would make the dies and molds?

A That is up to the die maker.

Q A mold maker would have to make them?

A A mold maker or a die maker. It depends on what way you are working, in what dies you are working.

(A-63, li. 19-25; A-64, li. 2-22)

* * * * *

(Footnote continued to p. 4)

counsel objected to this question as calling for a legal conclusion. After the objection was overruled, at A-54, li. 6, the simple answer "No" was given to the question. This is hardly an extensive expert analysis of whether Snyder's bank is "original" within the meaning of the Copyright Act. In fact, when Batlin's expert was cross-examined at A-67-68 concerning his definition of originality, it became clear that he was defining "originality" as "a complete change", e.g. "changing the pose, changing the mechanical function". He was not using the copyright test of authorship, as recited in Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2 Cir. 1951), extensively discussed in Appellants' Main Brief.

Any testimony that the changes between the 11-inch tall cast metal bank and the differently appearing 9-inch tall plastic bank were merely made for utilitarian or functional reasons may have been adduced when Batlin's pliable expert witness was led through his direct testimony. But, during his cross examination, this witness reviewed (between A-68 and A-81), and grudgingly acknowledged the many characteristics by which the cast metal

(Footnote continued from p. 3)

Q If you were given Plaintiff's Exhibit 1 and asked to make Plaintiff's Exhibit 2 from that --

A How would I go about it?

Q We heard already how you would go about that. What I am asking you is whether an artist would be necessary, a sculpture [sic] or somebody with artistic ability would be needed to go from Plaintiff's Exhibit 1 to 2.

A A certain amount of ability. (A-65, li. 25; A-66, li. 2-8)

* * * * *

and plastic banks differ. These differences are outlined in Appellants' Main Brief, pp. 6-8. This is artistic, not functional change.

The Requirements for Granting the Preliminary Injunction
in the Present Action were not Shown to be Present

The Court Below Failed to Make Findings
of Fact upon which the Grant of the
Injunction was Premised

As a panel of this Court observed at a hearing on June 24, 1975 with respect to Snyder's request for a stay of the injunction now under appeal, no findings of fact were made by the Court below.

Federal Rules of Civil Procedure Rule 52(a) requires that "in granting...interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". It is submitted that the five page Opinion of the Court below (A-114) contains virtually no findings. In the Opinion on p. A-115 appears: "The latter [Snyder's bank] reproduces the former [public domain metal bank] except that it proportionally reduces the height from approximately eleven inches to approximately nine inches with trivial variations." That apparently is the only finding, if it could be called that, appearing in the Opinion and relating to the copyrighted work. The Opinion does not evidence any awareness by the Court below of any of the circumstances surrounding the development of the copyrighted work or the significant dif-

ferences between the copyrighted work and the bank known in the public domain.

The Court below had before it in Jeffrey Snyder's Affidavit (A-36) and in Snyder's Memorandum opposing the request for Preliminary Injunction an expanded version of the statement of facts appearing in the Appellants' Main Brief herein at pp. 4-8. It is significant that the statement of facts appearing in Appellee's Brief herein at pp. 3-7 does not controvert the fact statement in Appellants' Main Brief, but instead supplements it. At the end of Appellee's statement of facts there is only a slightly different interpretation of the testimony of Batlin's expert witness, and this arises principally from Batlin's reliance upon the direct testimony of that witness while omitting the admissions and statements he made during his cross-examination.

Thus, the Court below did not make the requisite findings of fact and did not utilize any findings in reaching its conclusion. On this basis alone, the preliminary injunction was not properly issued. Ranger Fuel Corp. v. Disabled Miners of Southern West Va., 442 F.2d 1261, 1270 (4 Cir. 1971); cert. den., 404 U.S. 911 (1971); Sims v. Greene, 161 F.2d 87, 89 (3 Cir. 1947).

This Court Should Make Its Own Determination as to the Propriety of the Preliminary Injunction

This Court said in Hills Bros. Coffee v. Hills Supermarkets, Inc., 428 F.2d 379, 380 (2 Cir. 1970):

"While we ordinarily phrase the rule on review of denial of preliminary injunction as calling for reversal only for abuse of discretion...where the denial rests upon a finding (confusion of marks) which we may determine on an equal basis with the trial judge, we need not uphold the denial."

This Court can make its own determination on the grant or denial of the preliminary injunction because this Court has before it sufficient facts and evidence to conclude that Snyder's bank is original and/or creative and copyrightable.

The Court need not assess the credibility of any witnesses. The testimony of the expert witnesses (cross examination of Batlin's Bloch and entire examination of Snyder's Wurmbrand) is consistent on the relevant factual questions. See Ring v. Spina, 148 F.2d 647, 650 (2 Cir. 1945); cert. den., 335 U.S. 813 (1948). In Concord Fabrics Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1317 (2 Cir. 1969), this Court said:

"It seems clear to us that in its discretion, the district court should have granted a preliminary injunction. As we have before us the same record, and as no part of the decision below turned on credibility, we are in as good a position to determine the question as is the district court.

The order of the district court is reversed and the case remanded, with directions that an injunction issue pending the outcome of a trial on the merits."

As suggested by Batlin in its Brief at p. 8, it is the purpose of a preliminary injunction to preserve the status quo.

Before this action began, Snyder had, pursuant to the Copyright Act, 17 U.S.C., Secs. 106, 109, recorded his copyright with the United States Customs Service to prevent importation of unauthorized copies of his copyrighted work. The preliminary injunction in the present case changed this status quo, for it prevented enforcement of the Customs Service restriction order. If, as Justice Clark is quoted as saying in Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2 Cir. 1962), the status quo to be preserved is to be grounded on the court's estimation of the respective legal rights of the parties, due to the above described abuse of discretion by the Court below, and due to the showing in Appellants' Main Brief that the preliminary injunction against Snyder was not warranted, this Court should restore the status quo by dissolving the preliminary injunction.

Batlin's further claim of irreparable injury is irrelevant to this appeal, the Court below having predicated its decision solely on its view of the originality and creativity of Snyder's work. Moreover, although no statute or regulation requires Snyder show irreparable injury as a prerequisite to his applying for or obtaining the U.S. Customs exclusion order, Snyder detailed the harm that he will suffer by the continued importation and sale of copies of his copyrighted work in the U.S.A. at paragraphs 30-36 of his Affidavit (A-43-44). It should not be forgotten that it is Snyder who authored and originated an Uncle Sam bank, who went to the effort of having that

bank designed, created and sculpted and that it is he and Etna, the licensed seller of his bank, who are being severely damaged. If Batlin is being damaged, it is only because it copied Snyder's work in violation of Snyder's copyright.

The Court Below Erred by Using an
Incorrect Test of Copyrightability
in Granting the Preliminary Injunction

The Court below granted the Preliminary Injunction because of its incorrect legal tests of originality and creativity, as defined in Appellants' Main Brief. The Court below looked for "novelty" or "new idea" in Snyder's plastic Uncle Sam bank, i.e. novelty in the sense of the patent law. The Court below did this in the related, pending E. Mishan & Sons action (75 Civ. 428):

"Plaintiffs in their memorandum argue that this is Snyder's idea of Uncle Sam. It is not. This idea is clearly in the public domain, and is the same creative idea that exists in the antique banks.

Plaintiffs further rely on the change of size of the bank. It should be intuitively obvious that change of size in itself is not copyrightable." (Judge Metzner, at A-126, li. 20-23 - A-127, li. 1-4) [emphasis supplied]

Commenting upon Doran v. Sunset House Dist. Corp., 197 F. Supp. 940 (S.D. Cal. 1961); affd., 304 F.2d 251 (9 Cir. 1962), which case concerned the copyrightability of one of the

countless embodiments of Santa Claus, the Court below in the Mishan Opinion said:

"That idea [the idea of Santa Claus in a particular way] was original, and therefore the copyright was valid. There is no original idea here" [emphasis supplied] (A-126, li. 17-19)

This improper requirement of novelty was reiterated by the Court below in the evidentiary hearing in the present proceeding, in assessing the testimony of Batlin's expert witness:

"THE COURT: You've testified there is a difference between the hands --

THE WITNESS: You mean the fingers.

THE COURT: Yes. Is that novelty?

Q [by counsel] Is that novelty?

A Not as far as I'm concerned.

Q Is that new?

A It is just a better reproduction of this hand.

Q It is a different reproduction, is it not?

A It is the same hand, bent hand with fingers, showing the fingers. Here they don't show the fingers.

Q The question to you is, are the fingers different?

THE COURT: Yes, the fingers are different, but he doesn't think they are sufficient to call them novelty." (A-83, li. 19-25; A-84, li. 2-8) [emphasis supplied]

* * * * *

Based upon his feeling that novelty was required for originality, creativity and copyrightability, the Court below decided that all of the many significant differences that were

emphasized in the testimony and during the hearing were "merely trivial variations" and that there was no artistic contribution, despite the considerable artistic work done by the artist, sculptor who worked with Snyder (A-117).

Snyder is Likely to Prevail at the
Trial on the Merits

Snyder has not "vacillated" between calling his bank a work of art or a reproduction of a work of art. Whatever its classification, the bank is copyrightable.

Snyder's Bank Has Much More than that
Minimal Creativity Required for a Work of Art

Snyder's bank has sufficient creativity. See Nimmer on Copyright (supplemented to 1975), Sec. 19.1.

Gardenia Flowers Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968), is heavily relied upon by Batlin in its effort to show that Snyder's bank lacks creativity. But, the facts in the present case differ dramatically from those in Gardenia.

In the present case, Snyder worked with an artist, designer and sculptor who first drew and then modeled or sculpted a statue of a different size and in different proportions from the work in the public domain. In connection with, and not separate from, his reducing the size of the bank, the artist, sculptor also added a large number of other creative inputs,

which are detailed at pages 6-8 of Appellants' Main Brief. Every one of these inputs involved an independent creative step. Some of them, such as (3) the eagle figure on the base and (6) the anatomical shape of the Uncle Sam figure, were such great changes from the public domain bank that an entire creation was involved just in these changes alone. But, it is not any individual feature which Snyder fastens on for finding the requisite creativity. Rather, it is the overall redesign or creation of an Uncle Sam bank.

Because Snyder's bank was an independent creation by an artist, sculptor, when a side by side comparison between the new work and that in the public domain is made, many differences are apparent. The differences were not added to the new work for the purpose of distinguishing that work from what is in the public domain. Instead, a completely new work was created having its own characteristics. The differences simply resulted from the process of independent creation. It is not the differences between the new work and the public domain work that is the point of creativity, it is the independent creation of the new work.

Now, compare the foregoing with the facts in Gardenia:

At 280 F. Supp., p. 776:

"3. In June 1961, Snyder, president of Gardenia, visited the factory of Italspring, manufacturer of artificial flowers located in Milan, Italy; examined certain sample corsages previously manufactured by Italspring; furnished Italspring with other samples Snyder had obtained from various sources...None of the corsages involved in this suit...were created by the skill, labor or judgment of Snyder..." [emphasis supplied]

At 280 F. Supp., p. 780:

"12. Plaintiff's copyright claim in each of said artificial corsages is confined to the arrangement of the flowers therein, and it does not cover the individual component parts thereof (65,66).

"13. The artificial corsages involved in this case consisted of arrangements of flowers which were common and traditional in the flower industry at the time of plaintiff's claim of copyright. The arrangements in the corsages were old styles, lacking in both creativity and originality, and plaintiff's president had been aware of the existence of such arrangements in natural and cloth corsages prior to the time of its claimed copyrights..." [emphasis supplied]

At 280 F. Supp., p. 781:

"Plaintiff has conceded that its claims are limited to the arrangements of the flowers in the corsages. No claim is made that the component parts thereof are covered.

With respect to the arrangements in question, however, plaintiff's president testified that he did not create anything new." [emphasis supplied]

With the preceding findings and admissions of record, it is no wonder that the Court concluded at 280 F. Supp., p. 781:

"There is no evidence of creativity in plaintiff's flower arrangements."

The present case is factually distinct. The arrangement in Gardenia was admittedly old and the copyright was confined to the arrangement. In the present case, the copyright

proprietor has created a new bank of different size. It was not copied from other sources (compare Gardenia's Finding 3, quoted above). Because of the independent creation of Snyder's bank, it has many different features from the public domain metal bank.

Also, in Gardenia, the Court found that the allegedly copyrightable innovations were made solely for utilitarian or mechanical reasons. 280 F. Supp. at p. 776. On the other hand, it is apparent in the present instance that changing the height and other features of the Uncle Sam bank was not merely mechanical or utilitarian. These changes have esthetic value. All of the other changes detailed at pp. 6-8 of Appellants' Main Brief arose due to the original, creative acts involved in fashioning a smaller bank.

Admittedly, Snyder made some selections, such as adopting plastic as the medium, for pragmatic reasons. But, this is what every artist must do. He must select his medium (a painter selects oils or water colors) and Snyder selected plastic; he must select some height for his statue (Snyder could have made a 4-foot Uncle Sam, but it was not practical), etc. But, after the various functional parameters, within which Snyder's artistic work was to be created, were selected, thereafter all of the designing was artistic and creative and not solely mechanical and functional.

That expert testimony relied upon by Batlin at p. 13 of Appellee's Brief was negated by the cross-examination of that

same expert witness, as discussed ante herein in the footnote at pp. 2-4. After Batlin's expert was finished with his entire testimony, it was quite clear that there are significant changes between Snyder's bank and the bank in the public domain, changes so significant as to prove artistic creativity.

Snyder's Bank Has Much More than the
Minimal Originality Required for It to
be Copyrightable as a Work of Art or
as a Reproduction of a Work of Art

Snyder's bank has sufficient originality. See Nimmer on Copyright (supplemented to 1975), Secs. 19.2 and 20.2.

By applying the test of Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2 Cir. 1951) in the context of the precedents reviewed in Appellants' Main Brief at pp. 11-19, the conclusion is inescapable that Snyder has contributed not a "merely trivial variation", but a number of artistic changes which are recognizably his own. These arose from the sculpting needed to produce his reduced size copyrighted work. Snyder authored not a mere copy of the work in the public domain, but an "original" work.

Batlin's attempt in Appellee's Brief at p. 15 to distinguish the present situation from Alva Studios Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959) on their respective facts is unsuccessful. The names, dates, size differences and other factual features of the present case could be directly substituted for those in Alva Studios. To quote the Alva Court at 177 F. Supp., p. 265:

"It is hornbook that a new and original plan or combination of existing materials in the public domain is sufficiently original to come within the copyright protection [Citation]. However, to be entitled to copyright, the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another [Citation]. The plaintiff has the burden of establishing these elements...

Plaintiff has sustained this burden. Its copyrighted work embodies and resulted from its skill and originality in producing an accurate scale reproduction of the original. In a work of sculpture, this reduction requires far more than an abridgement of a written classic; great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude.

It is undisputed that the original sculpture owned by the Carnegie Institute is 37 inches and that plaintiff's copyrighted work is 18 1/2 inches."

In the present case, there is a smaller size, substantially scale reproduction of an original metal bank. There are differences between the two banks, but, as noted ante, pp. 11-12, those differences arose because of the number of artistic steps through which the work passed and because an artist, sculptor made a creative contribution thereto.

In Alva, at 177 F. Supp., p. 266, the Court was impressed with the fact: "It takes 'an extremely skilled sculptor' many hours working directly in front of the original." for the Alva sculptor to have made the reduction. At the hearing before

the Court below, Snyder's expert witness, unquestionably an expert in artistic sculpting of plastic material (A-87-90), testified that if he were to have produced Snyder's plastic bank from the metal public domain model:

"Q How long would it take you to do that [produce Snyder's plastic bank from the metal original]?

A About a day and a half, two days' work.

Q How would you rate that -- would that be an easier piece than you worked on or a more difficult piece?

A I would put it in between medium and difficult." (A-104, li. 7-11)

So, in Snyder's case also, it would take "an extremely skilled sculptor" many hours working directly in front of the original [the Alva test] Uncle Sam bank to produce Snyder's plastic Uncle Sam bank.

But the Alva case says even more, at 177 F. Supp.

p. 267:

"The originality and distinction between the plaintiff's work and the original also lies in the treatment of the rear side of the base. The rear side of the original base is open; that of the plaintiff's work is closed. We find that this difference when coupled with the skilled scaled sculpture is itself creative." [emphasis supplied]

In the present case, there is not only one difference between the public domain bank and Snyder's bank, as in Alva, but a number of differences, as detailed at pp. 6-8 of Appellants' Main Brief. The several differences embodied in the Snyder bank, e.g. the

different eagle figure, the differently shaped face and anatomy of the Uncle Sam figure and the scaled down size of the Snyder sculpture itself, are certainly original as that term is defined in the copyright law.

It may be arguable whether any more skill is required for Alva's precise reduction (with the exception of the base of the statue which was not precisely reproduced in Alva) than is required for a reproduction in which some original thought and original sculpting work results in differences in appearance, as in the present case. But the copyrightability of Snyder's bank cannot turn on the question of whether more skill or more sculptor's time was required in Alva than in the present case. In Snyder's case, certainly much more than that minimal effort, that "prohibition of actual copying", required for originality has been expended.

As noted by Batlin, the Court below distinguished the present situation from Alva (at A-118) on the basis of the visible differences between the metal public domain bank and Snyder's bank, as compared with the asserted exactitude of the copying in Alva. But, as noted above, these differences were here produced because some original drawing and sculpting work was involved in the size reduction in the present situation and because an artist, sculptor imparted his own contribution. In Alva, the Court was impressed with the change made in the base of the Rodin statue;

in the present case, in contrast, the lower Court has ignored the many changes in Snyder's reproduction which, as in Alva, enhance its originality and copyrightability, instead of detracting therefrom.

Batlin next turns to Gardenia Flowers Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968) wherein the court found no originality. As pointed out in the portions of the Gardenia opinion quoted hereinabove, ante pp. 12-13, the Gardenia copyright owner and his designer designed nothing. Their arrangements of flowers were not original or authored by them in any way. Instead, the arrangements themselves were available to the copyright proprietor and presumably could be deemed to have been copied by him, but they certainly were not independently designed or created by him. With this background, it is no wonder that the Court in Gardenia found no originality. In dealing with the originality requirement in Gardenia, the Court said, 280 F. Supp., at p. 782:

"As with the question of creativity, though, the fact that only minimal standards need be applied does not prevent the court from concluding as a matter of fact that works may lack even the modicum of originality required. When the copyright claimant has added nothing of his own to a work, then copyright protection must be denied [Citation].

"Much of the same reasoning which led this court to the determination that plaintiff's corsages were devoid of creativity applies with equal force to its claim of originality....

"Once more it must be noted that plaintiff's claims relate only to the arrangements of the components of the corsages and not the component parts themselves. These arrangements...were old traditional styles in the flower industry and they had existed in both natural and cloth corsages well before the time the works at issue appeared in plastic...

"Concededly,...even artificial flowers themselves have been given copyright protection where they represented some originality in the treatment of the subject... plaintiff has shown no originality in the patterns of arrangements it chose..." [emphasis supplied]

In Gardenia, had there been some original contribution, instead of merely copying an arrangement known in the public domain, there might have been copyrightability. In the present case, with the reduction in size and all of the artwork and sculpting work inherent in such reduction, there is much more than the minimal original contribution.

Snyder's Reduced Scale, Differently Shaped
Plastic Bank Was Not a Mere Trivial Variation
of the Previous Metal Bank and Thus Snyder's
Bank is Copyrightable

Donald v. Uarco Business Forms, 478 F.2d 764 (8 Cir. 1973) is relied upon by Batlin at p. 17 of Appellee's Brief in an effort to show that Snyder's bank is not original or creative. Donald concerned legal forms and had nothing to do with three-dimensional works, works of art or reproductions of works of art. Moreover, buried in that lengthy quote from Donald appearing in Appellee's Brief is a factual nugget which distinguishes Donald from the present case:

"...appellant had knowledge of, and drew upon, legal forms which already existed in the public domain when he drafted his form. Most of the form is phrased in standard legal language....The appellant argues that he is entitled to a copyright because this is the first time such language has been used in a service contract even though the language has previously been used in sales contracts which were already existing in the public domain." [emphasis supplied]

In the present case, on the other hand, there was a complete reworking of the public domain metal statue, involving hours of designing and sculpting. In the context of three-dimensional works, Snyder's bank embodied more than the required degree of originality.

That the proposition set forth in Donald is not new, as Batlin asserts on p. 18 of its Brief, is not denied. But, Ferris v. Frohman, 223 U.S. 424 (1911), discussed by Batlin in this context, has nothing to do with that proposition. Ferris involved the question of title to a copyright and protection of a copyright in the U.S.A. The final passage in the Opinion, which is what Batlin has quoted, relates to whether someone has infringed the copyright. It is irrelevant to the question of copyrightability. L & L White Metal Casting Corp. v. Joseph, 185 USPQ 269, 272 (E.D.N.Y. Jan. 1975). Whether Snyder's 9-inch tall plastic bank would be a piratical copy of the public domain metal bank is not even relevant here. The only relevant question is whether Snyder's bank is original, and the many precedents on the subject prove that it is.

At p. 19 of Appellee's Brief, Batlin cites a statement made by the Court below in the related Mishan case (at A-126-27) which shows the lack of understanding by the Court below of pertinent copyright law and shows why the preliminary injunction granted in the present case was an abuse of discretion. In his Opinion in the Mishan case (at A-127) the Court below said:

"It should be intuitively obvious that change of size in itself is not copyrightable. If that were true, every copyright of a work of art would be meaningless, as anyone could produce it simply by varying the size."

This statement perhaps confuses infringement and copyrightability. A work may itself be copyrightable, yet also constitute an infringement of an earlier copyrighted work. L & L White Metal Casting Corp. v. Joseph, supra.

Moreover, the lower court has dismissed the fact that together with the change in dimensions, a number of additional esthetic changes have been made in the Snyder bank, which evidence the originality of the copyrighted work. On the face of this record, these many changes cannot be lumped together and simply dismissed as mere trivia, to support the extraordinary relief granted herein.

Doran v. Sunset House Dist. Corp., 197 F. Supp. 940 (S.D. Cal. 1961); affd., 304 F.2d 251 (9 Cir. 1962) noted by Batlin at p. 19 of Appellee's Brief, deals with Santa Claus, a well known personality who has certainly been reproduced in

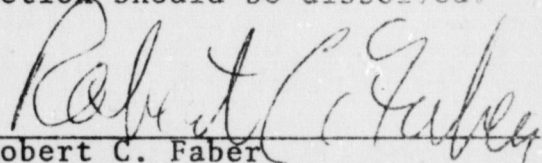
countless variations and versions. Yet in Doran, the particular version which the copyright owner had adopted as his own was held to be original and copyrightable to him. Similarly in the present case, Snyder's particular variation of Uncle Sam and of an Uncle Sam bank is properly copyrightable to Snyder.

Copyrights in three-dimensional works, whether they be works of art or reproductions of works of art, do not protect "ideas", contrary to that passage in the Opinion of the Court below in the companion E. Mishan & Sons case (at A-126). Copyrights protect artistic expressions. The Court below incorrectly applied a novelty test in assessing copyrightability. But, novelty is not the test for valid copyright. One merely looks for authorship (for a reproduction of a work of art) and creativity (for a work of art). Both are present in Snyder's bank. Snyder's bank is copyrightable. The lower court's finding of Batlin's likely success was in error.

Conclusion

The Preliminary Injunction should be dissolved.

New York, New York
July 24, 1975


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UNUNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

against

JEFFREY SNYDER, et al.,

Defendants-Appellants

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 28th day of July 19 75 at 521 Fifth Ave, N. Y., N. Y

deponent served the annexed

Reply Brief

upon

Jacobs & Jacobs

the Attorneys in this action by delivering ²⁵ a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,Sworn to before me, this 28th
day of July 19 75

Print name beneath signature

JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977